

## Nguyen (Migration) [2021] AATA 3909 (19 July 2021)

### DECISION RECORD

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| <b>DIVISION:</b>                  | Migration & Refugee Division                                                                                                                                                                                                                                                                                                                        |
| <b>APPLICANT:</b>                 | Mrs Thi Thanh Huong Nguyen                                                                                                                                                                                                                                                                                                                          |
| <b>CASE NUMBER:</b>               | 1811470                                                                                                                                                                                                                                                                                                                                             |
| <b>HOME AFFAIRS REFERENCE(S):</b> | BCC2016/1977935                                                                                                                                                                                                                                                                                                                                     |
| <b>MEMBER:</b>                    | Meredith Jackson                                                                                                                                                                                                                                                                                                                                    |
| <b>DATE:</b>                      | 19 July 2021                                                                                                                                                                                                                                                                                                                                        |
| <b>PLACE OF DECISION:</b>         | Brisbane                                                                                                                                                                                                                                                                                                                                            |
| <b>DECISION:</b>                  | <p>The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:</p> <ul style="list-style-type: none"><li>• cl 820.211(2) of Schedule 2 to the Regulations</li><li>• cl 820.221 of Schedule 2 to the Regulations.</li></ul> |

Statement made on 19 July 2021 at 4:31pm

### CATCHWORDS

*MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – financial aspects – nature of the household – DNA Parentage Testing Procedure report – social aspects – nature of the commitment – decision under review remitted*

1.

### LEGISLATION

*Migration Act 1958 (Cth), ss 5F, 65*

*Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 820.211, 820.221*

### CASES

*Bretag v MILGEA [1991] FCA 582*

*He v MIBP [2017] FCAFC 206*

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The applicant applied for the visa on 7 June 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 because the delegate was not satisfied the applicant was the spouse or de facto partner of the sponsor, as defined under section 5F and 5CB of the Act.
5. The applicant was represented in relation to the review by her registered migration agent Mr John Bui of Bui Lawyers in Cabramatta, NSW.
6. On 11 June 2021, the Tribunal wrote to the applicant inviting her to provide documents and other information on which she intended to rely to support her claims that she and her partner are in a spouse or de facto relationship. The information was to be received by 25 June 2021. The applicant did not respond by the deadline and the hearing was vacated. On 29 June 2021, the applicant responded, providing evidentiary photographs and other documents including a birth certificate for an infant child born on 20 March and a request for a delay while they sought DNA Parentage testing. It was granted, and on 16 July the applicant provided the results of the testing, which are referred to below.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

### CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the applicant at the time of application and at the time of this decision, is the spouse or de facto partner of the sponsor and meets cl 820.211(2)(a) and cl 820.221 of the Regulations.

#### Whether the parties are in a spouse or de facto relationship

9. Partner visas involve a two stage process. The visa applicant must hold a provisional visa in order to be granted a permanent visa. The grant of the provisional visa enables the visa applicant to travel to and remain in Australia on a temporary basis. The grant of a permanent visa may subsequently be considered, and generally depends on whether the relationship has continued for a period of at least two years.
10. Clauses 820.211 and 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.

11. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

**Are the parties validly married?**

12. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided evidence of a marriage between the parties that was solemnised on Saturday 28 May 2016. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

**Are the other requirements for a spouse relationship met?**

13. The Tribunal in forming a view as to whether the other requirements for a spouse relationship are met, has considered each of the matters specified in reg 1.15A(3)(a), (b), (c) and (d), and any other circumstances of the relationship under reg 1.15A(2), which include the financial aspects of the relationship; the nature of the household; the social aspects of the relationship and the nature of the persons' commitment to each other.

- *Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.*

14. With the visa application, the applicant provided a copy of the sponsor's Will of 22 June 2016. The Will leaves the sponsor's property (Lot 8 on SP 24271) to the applicant for her sole use; and the remainder of his property including superannuation, to his children. The applicant provided a 2017 tenancy agreement for rental premises in Charleville in the sponsor's name, naming the sponsor as sole tenant. The applicant provided copies of mail postmarked 4 June 2021, including a Medicare card, which was sent to her by Medicare at the address on the sponsor's lease. She also provided receipts for home items. The applicant provided payslips dated 2018 for the sponsor for his work for the Department of Agriculture in Queensland. The Tribunal affords these documents some weight in its considerations.
15. In an undated submission to the Department with the visa application, the sponsor stated that the parties opened a joint account at Suncorp and operate jointly from it. He claimed that as a "vet", he is provided with free accommodation and payment of living expenses. He stated that his income funds around 70 per cent of the parties' living expenses while his wife contributes 30 per cent, mostly for food and related expenses. Because no evidence of the bank account has been provided, the Tribunal affords this claim no weight.
16. The Tribunal has considered the information and concludes that the sponsor has provided accommodation and support to the applicant and has provided for her in the case of his death. The Tribunal has before it no other evidence that the parties share the

ownership of assets or hold liabilities together. Apart from a statement by the sponsor, supported in the application for the visa, the applicant has provided little in the way of documentary evidence that the two have pooled their finances or acquired assets and liabilities together. The Tribunal affords the financial aspects of the relationship limited weight.

- *Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.*

17. As stated above, the applicant provided evidence of Medicare correspondence that indicates her address as that of the sponsor in Charleville; and the address is the supplied email address for the applicant in relation to the review. The Tribunal affords this document some weight, primarily because the address is of long-standing for the sponsor and tends to confirm that the parties have lived together long term.

18. Since the primary decision, the applicant and sponsor on 20 March 2020, produced a child of the relationship. This is a key focus of their submissions to the Tribunal on review. Extensive evidentiary photographs show the infant in the company of the applicant and sponsor. In the photographs, the sponsor is revealed as present at the child's birth; feeding the child; taking a nap with her; playing and working with her; attending her birthday celebrations and generally sharing in her care. The applicant requested an opportunity, which the Tribunal granted, to provide a DNA Parentage Testing Procedure report. The report, dated 14 July 2021 and issued by Genomic Diagnostics ([genomicdiagnostics.com.au](http://genomicdiagnostics.com.au)), indicates the relative chance of paternity as 99.9996 per cent and concludes that (the sponsor) John William Riley is the probable father of the child. The Tribunal accepts the report's findings and its indication that the sponsor is correlated as the applicant's father.

19. The applicant has not provided updated evidence as to how the household in which the parties continue to cohabit is run, but the Tribunal notes the applicant claimed in the visa application that it functions as a shared arrangement with few rules on who does what in the way of housework. The photographic evidence provided of the child with her parents indicates that the parties share in her care across a range of scenarios.

20. The Tribunal having considered the nature of the household, finds the parties share care and responsibility for their child; share their living arrangements, and share housework. The Tribunal affords this aspect considerable weight in the decision.

- *Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.*

21. The applicant provided no updated evidence of how the parties represent themselves to other people as being married to each other. Statutory declarations provided with the application from Campbell James McPhee and Linda Lena O'Sullivan, support that at that time (2017) the parties, whom they knew over several years from work, represented themselves as a couple so in a range of settings, including at their wedding. The Tribunal notes that evidentiary photographs indicate the sponsor was present at, or soon after, the infant's birth in 2020, which is a strong indicator that they continue to present themselves as a couple, and as parents. This notwithstanding, the applicant and sponsor, who are advised, appear to have made very little effort to provide the Tribunal with convincing evidence of important aspect of their relationship and appear, at least at the time of the review, to be relying on photographs to convey their message. This is difficult to understand, given that the visa was refused on the basis of insufficient

evidence. The low-effort contribution on the part of the applicant, sponsor and their representative, whose combined role it is to convince the Tribunal that the social aspects of their relationship indicate it is a going concern, is not explained. The parties were given additional time to do so, and more time has elapsed between their final submission and this decision. That said, it has been just possible for the Tribunal to extract, from the scant evidence, that they do present as a couple in key circumstances, for example they did so, importantly, at the birth of their child. The Tribunal, having examined a bare minimum of evidence, affords the social aspects of the relationship some weight in this decision.

- *Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.*

22. The parties claim they met at work, which is a meat exporter business in western Queensland on 1 December 2013 where the applicant claims she was a meat worker and the sponsor a veterinarian. This meeting was three weeks after the applicant arrived in Australia as the holder of a Temporary Work (Skilled) (UC 457) visa; a dependant of her late husband, Binh Han Ly. A submission provided to the Department by the sponsor, and supported by witness statements, records that Mr Ly died suddenly in November 2015. The applicant claimed that at this time, the sponsor in the present matter went to considerable lengths to support and assist the applicant with her husband's funeral and the aftermath of his passing. The sponsor claimed that the applicant relied on him for everything, and by about February 2016 a relationship had developed: Ms Nguyen attracted, Mr Riley states, by his "kindness and generosity". The sponsor states that he and the applicant subsequently introduced each other to their families, and both sides were supportive of the relationship. On 28 May 2016, they committed to marriage. The sponsor claims that the applicant deserves to live a happy life after what she went through, and for relieving his loneliness.

23. The Tribunal has little documentary information before it on the commitment aspect of the relationship, but on what has been submitted, particularly the evidentiary photographs and the formal submission made by the sponsor, it is possible to glean that the parties share a commitment to each other, and to the relationship, which now consists of three people including an infant. The Tribunal notes the parties have been in each other's company, and living together, since early 2016, and that they appear to be committed to one another, have married and had a child together. The sponsor and applicant have declared they see the relationship as long-term and there is no contrary information before the Tribunal.

24. The Tribunal has considered, however, that given the relatively scant evidence before it on this aspect, the exact nature of the relationship is not entirely clear. In the end, however, this decision does not turn on whether it is a traditional, loving relationship, as the sponsor claims, or a genuine and warm solution for two people married to one another and each entitled to happiness, that has experienced the added joy of the birth of a child they clearly care for. It is evident to the Tribunal that the parties genuinely rely on each other for companionship and support and emotional support, are living their lives drawing on those aspect, and are focussed on providing for and parenting their child. The Tribunal having considered all the information before it, on balance, affords this aspect of their circumstances weight in the applicant's favour.

- *Any other circumstances of the relationship.*

25. For the Tribunal, evidence on which to base a decision about the overall nature of the relationship relies heavily on the credibility of the information before it. In terms of

volume, there is little substantive documentary support for their case; they have not given oral evidence as intended, because they responded late to a request for information issued under s.359(2) of the Act and lost their right to a hearing, as described above. With the exception of some references to their circumstances in submissions and dates in declarations and documents provided with the visa application, the Tribunal has had little to work with in establishing the nature of the relationship at the time of the application. The Tribunal is mindful, however, that the best and preferable decision is required. With that in mind, the Tribunal finds the parties have been together since 2016; have a small child needing their care; their arrangements appear to be mutually supportive and there is no indication they will not continue into the future. The Tribunal finds the tone of their evidence to be candid and not contrived, and this supports their credibility and that of the information they have submitted.

26. To provide the conditions for the grant of the visa, the parties must also meet the consideration in r.1.09A regarding whether they have a mutual commitment to a shared life to the exclusion of all others and the relationship is genuine and continuing. In forming a view on this, the Tribunal notes that, to the extent that later events logically show the existence or non-existence of facts at an earlier time, those later events may be taken into account to show the existence or non-existence of facts at the earlier time (*Bretag v MILGEA* [1991] FCA 582). The Tribunal having considered the evidence in this light, on balance, considers that the parties have a mutual commitment to a shared life to the exclusion of others; a genuine and continuing relationship; and live together and not separately and apart on a permanent basis.
27. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made and at the time of this decision.
28. As the parties at the time of decision are validly married and in a spousal relationship, s.5F(2)(a)-(d) is satisfied.
29. There is no evidence that Mr Riley is prohibited from being a sponsor and the Tribunal has found that Ms Nguyen is sponsored as required and held a substantive visa at the time of the visa application.
30. The Tribunal therefore finds that the requirements of cl.820.211(2) were met at the time of the visa application and continue to be met at the time of decision, such that cl.820.221(1) is also met.
31. The Tribunal finds cl 820.221 is met.
32. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

## DECISION

33. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
  - cl 820.211(2) of Schedule 2 to the Regulations
  - cl 820.221 of Schedule 2 to the Regulations.
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Meredith Jackson  
Member

## **ATTACHMENT - Extract from Migration Regulations 1994**

### **1.15A Spouse**

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or
  - (c) a Partner (Residence) (Class BS) visa; or
  - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day to day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).